

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell

Powerex Corporation

v.

Docket No. EL03-50-001

California Power Exchange Corporation

ORDER GRANTING CLARIFICATION AND DENYING REHEARING

(Issued July 24, 2003)

1. In this order, we grant Powerex Corp.'s (Powerex) request for clarification and deny its request for rehearing of the Commission's order issued on March 27, 2003.¹ In that order, the Commission denied Powerex's complaint seeking release of Powerex's collateral posted with the California Power Exchange Corporation (CalPX) and return of Powerex's Chargeback Amount. This order benefits customers because it will ensure that Powerex meets its outstanding obligations and that the ultimate CalPX creditors are paid.

Background

2. As a condition for participating in CalPX's markets, Powerex was required, in accordance with CalPX's tariff, to post collateral for 100 percent of its requirements in CalPX's markets in excess of its unsecured line of credit. As a result, Powerex posted a letter of credit in the amount of 67 million dollars with the CalPX to cover its aggregate outstanding liabilities to CalPX. After CalPX suspended operations in its core markets² on January 31, 2001 and its tariff terminated on May 1, 2001,³ the CalPX retained collateral posted by Powerex, as well as other CalPX participants.

¹Powerex Corp. v. California Power Exch. Corp., 102 FERC ¶ 61,328 (2003) (March 27 Order).

² The core markets are the spot market for day-ahead and the spot market for day-of electricity trading.

³ See San Diego Gas & Electric Company, et al., 93 FERC ¶ 61,294, at 61,999 (2000).

3. In addition, based upon non-payments by Southern California Edison Company (SoCal Edison) and Pacific Gas and Electric Company (PG&E) to the CalPX in January and February of 2001, beginning on or about January 20, 2001, the CalPX issued a number of invoices to CalPX participants that charged back⁴ the shortfalls from SoCal Edison's and PG&E's defaults to the non-defaulting CalPX participants. As a result, Powerex was charged back 3.6 million dollars.

4. Subsequently, the Commission issued an order⁵ invalidating the application of the chargeback mechanism by the CalPX as unjust and unreasonable on the ground that using the chargeback provision in those circumstances would cause virtually all participants to default.

5. On February 20, 2003, Powerex filed a complaint requesting that the Commission direct the CalPX to: (1) release Powerex's 67 million dollars letter of credit that Powerex provided to the PX in order to participate in the CalPX's core markets; and (2) return Powerex's Chargeback Amount of 3.6 million dollars (plus any interest). In particular, Powerex stated that the CalPX and the California Independent System Operator (CAISO) owe it approximately 284 million dollars. According to Powerex, after considering the amounts Powerex owes to the CalPX and the CAISO (approximately 5.1 million dollars) and the refunds claimed by the CalPX and the CAISO in the Docket No. EL00-95, et al., refund proceeding⁶ (approximately 178 million dollars), Powerex will still be owed 101 million dollars, plus interest, by the CalPX and the CAISO.

⁴A chargeback is an allocation mechanism intended to allow the CalPX to recover the uncollected receivables of a defaulting CalPX debtor from the remaining CalPX participants.

⁵PG&E Company, et al., 95 FERC ¶ 61,020 (2001) (Chargeback Order).

⁶San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corp. and the California Power Exch. Corp., 101 FERC ¶ 63,026 (2002) (Findings on Refund Liability). In that proceeding, the Administrative Law Judge made findings of fact with respect to: (1) the mitigated price in each hour of the relevant refund period; (2) the amount of refunds owed by each supplier, including Powerex, according to a methodology prescribed by the Commission; and (3) the amount currently owed to each supplier (with separate quantities due from each entity) by the CAISO, the investor owned utilities, and the state of California. See San Diego Gas & Electric Co. v. Seller of Energy and Ancillary Serv., et al., 96 FERC ¶ 61,120 at 61,520 (2001).

6. With regard to Powerex's letter of credit, the Commission stated in the March 27 Order that it was premature for the Commission to release Powerex's letter of credit based solely on an examination of Powerex's potential refunds, as determined in the Findings on Refund Liability,⁷ because the Commission did not yet know if those amounts represented the extent of Powerex's ultimate potential liability in the Docket No. EL00-95, et al., proceeding, as well as other proceedings affecting the CalPX markets. Furthermore, the Commission concluded that only after it had ascertained the impact that the evidence submitted in the 100-Day Discovery Proceeding⁸ would have on the outcome of the EL00-95, et al., refund proceeding, could it determine whether Powerex's collateral exceeds its potential refund liability and whether release of Powerex's collateral was warranted. In addition, the Commission explained that until those figures were determined, the process of final billing and settling with regard to Powerex's transactions that occurred in the PX's markets could not take place.

7. In the March 27 Order, the Commission also addressed Powerex's request for release of its Chargeback Amount. The Commission deferred further action on that request pending rehearing of the Chargeback Order.

8. On April 25, 2003, Powerex filed a request for rehearing of the March 27 Order.

Discussion

9. On rehearing, Powerex, for the most part, reiterates the arguments it made in its complaint against CalPX. In particular, it argues that the collateral provided under the CalPX tariff was never intended to provide security for reasons beyond those specified in Schedule 2, Section 2 of the CalPX tariff.⁹ Powerex explains that its potential refund obligation in the EL00-95, et al., refund proceeding cannot be an outstanding liability under the CalPX tariff because it is not an existing obligation and because it did not arise between the CalPX's cash clearing cycles.

⁷See id.

⁸See San Diego Gas & Elec. Co., 101 FERC ¶ 61,186 (2002) (100 Days of Discovery), order on reh'g, 102 FERC ¶ 61,164 (2003), reh'g pending.

⁹Schedule 2, Section 2 of the CalPX tariff states in pertinent part: "Each PX Participant shall maintain sufficient collateral to cover its aggregate outstanding liabilities ... to and from the PX between clearing cycles or during the period in which the liabilities are incurred and when payment is billed and settled."

10. The Commission addressed this very argument in the March 27 Order at 62,124, para. 27. Specifically, we stated that:

the PX Tariff permits the PX to retain collateral until all of the PX Participants', such as Powerex, trades in the PX's market are fully resolved (i.e., their liabilities are finally determined, billed, and settled). In fact, under the provisions of the PX's Tariff, a PX Participant is required to post collateral as security for potential defaults arising from a participant's failure to pay its outstanding liabilities to the PX and its outstanding obligations are not extinguished until they are billed and settled. Accordingly, because Powerex's final billing and settlement have not yet taken place, we find, as we have stated before, that the PX's retention of Powerex's letter of credit is not inconsistent with the PX's Tariff, a violation of the filed rate doctrine, or contrary to the Commission's policy. (Footnotes omitted).

11. Powerex disputes the Commission's finding in the March 27 Order that release of collateral at this time would prejudice important issues that parties have raised in the 100-Day Discovery Proceeding. It maintains that allowing the CalPX to retain Powerex's collateral prejudices as true allegations in the 100-Day Discovery Proceeding regarding Powerex's potential refund liability. Furthermore, Powerex argues that the Commission has not taken any official action that indicates that Powerex could be liable for potential refunds as a result of the submission of evidence in those proceedings.

12. In the March 27 Order, we explained that Powerex's potential refund liability could not be determined based on the refunds detailed in the Findings on Refund Liability because the submissions in the 100-Day Discovery Proceeding (which will affect refund calculations) had not yet been evaluated for relevancy and accuracy. At that time, we did not want to make any pronouncements regarding the 100-Day Discovery Proceeding evidence in order to avoid prejudging very important issues raised in that proceeding. As we also stated in the March 27 Order, various ongoing proceedings could result in Powerex's, as well as other sellers', potential refund liability being substantially increased.¹⁰ Accordingly, we reiterate here that in the event that the billing and settlement determinants are revised and refunds are ordered by the Commission, the CalPX should have adequate collateral to ensure that there are sufficient funds that will guarantee that

¹⁰E.g., the Commission has already adopted a new pricing methodology for the gas price proxy values. See San Diego Gas & Elec. Co., et al., 102 FERC ¶ 61,317 (2003). Because those values will be lower than the index prices used by the judge in the Findings on Refund Liability, estimated energy costs will be smaller and refunds will be larger.

CalPX participants meet their obligations when their liabilities are finally billed and settled.¹¹ Thus, because we are still in the process of reviewing the evidence put forth in the proceedings affecting the financial obligations of CalPX participants, including Powerex, it is premature for us to release any of Powerex's collateral until we conclude our review of the evidence in those proceedings and all transactions in the CalPX markets can be regarded as "billed and settled."

13. Powerex correctly states that we have not taken any official action concerning the evidence proffered in those three proceedings. It is exactly for that reason that it is still premature for us to make any decisions regarding Powerex's refund liability when Powerex's potential refund liability is not yet known due to the ongoing matters. The Commission is still to determine if the refund amounts identified in the Docket No. EL00-95, et al., refund proceeding either represent the extent of Powerex's ultimate liability or whether refunds in addition to those contemplated in the Findings on Refund Liability are warranted.

14. Powerex further alleges that the March 27 Order failed to explain the Commission's departure from established policy that a guaranty for the payment of refunds is required only when extraordinary circumstances are present. This assertion is misplaced. We denied Powerex's request for release of its collateral on the ground that retention of the collateral is required under the CalPX tariff.¹²

15. Powerex also states that requiring it and other market participants to maintain an unnecessary letter of credit creates uncertainty for market participants by decreasing liquidity in the financial markets and increasing the likelihood of a continuing resource deficiency in California. Powerex alleges that this is contrary to the Commission's responsibility to protect the public interest and to the Commission's objective of restoring confidence in California's markets. It adds that allowing the CalPX to retain millions of dollars that belong to Powerex continues to signal to market participants that investment in the Western energy market is not secure and that participants cannot rely on good faith participation consistent with the rules in place.

¹¹Powerex's potential refund liability is, according to Powerex, approximately 178 million dollars. But this amount is apparently premised on a range of issues that are subject to challenge. Accordingly, Powerex's potential refund liability could far exceed any collateral currently maintained for Powerex in the CalPX and, in fact, could far exceed any amounts purportedly owed to Powerex by the CalPX.

¹²See March 27 Order at 62,124.

16. We responded to a similar argument in the order addressing another complaint seeking release of collateral posted with CalPX. In particular, we stated:

The Commission recognizes the importance of liquidity in the financial markets and the need for entities like PGET to obtain financing for numerous transactions. The Commission is, however, faced with circumstances that were not contemplated when the Commission approved the 'billed and settled' provision of the CalPX Tariff. . . . Under these unusual circumstances, the Commission finds that retaining the collateral is in the public interest because we are enforcing the terms of the Tariff to ensure that PGET meets its outstanding obligations and the ultimate CalPX creditors are paid.¹³

We reach the same conclusion here. Retaining the collateral is in the public interest because it ensures that Powerex meets its outstanding obligations and that the ultimate CalPX creditors are paid.

17. In addition, Powerex argues that the Commission erred in failing to direct the CalPX to return Powerex's Chargeback Amount, and, therefore, in effect, granted an unwarranted stay of the Chargeback Order in which the Commission determined that the chargeback methodology that the CalPX used to collect on the defaults of PG&E and SoCal Edison was unlawful and directed the CalPX to rescind the chargebacks that it unlawfully imposed.

18. We disagree. In the Chargeback Order, the Commission directed the CalPX to "rescind all prior chargeback actions related to PG&E's and SoCal Edison's liabilities."¹⁴ In fact, the PX, as Powerex conceded,¹⁵ has credited back the chargebacks on the statements that it issued to the CalPX participants, although it has not actually returned the Chargeback Amount to Powerex. However, whether that action constitutes a rescission of the chargebacks or whether the CalPX was required by the Commission's use of the word "rescind" in the Chargeback Order to immediately return the amounts collected in the chargebacks to CalPX Participants are issues pending on rehearing of the Chargeback Order. Thus, the Commission has not stayed the Chargeback Order (*i.e.*, postponed the effective date of action taken by it); rather, the issue at hand is pending on rehearing.

¹³PG&E Energy Trading-Power, L.P., 102 FERC ¶ 61,091 at 17-18 (2003) (denying PGET's request that the PX release its collateral because PGET's "potential refund liability for the PX and [CA]ISO transactions substantially exceeds the amount of its collateral").

¹⁴See Chargeback Order at 61,045.

¹⁵See Powerex Complaint at 15.

Therefore, this is not the proper forum for the Commission to address the issue raised by Powerex.

19. Powerex requests that the Commission clarify whether it has deferred action on Powerex's request for the release of the Chargeback Amount or whether it has denied that request. Furthermore, Powerex asserts that if the Commission responds that it deferred Powerex's request in the March 27 Order regarding chargebacks, Powerex seeks rehearing of the deferral because a significant amount of time has passed since the Commission found that the use of the chargeback provision was unlawful. As we stated in the March 27 Order, "we defer further action on [the chargeback] matter pending the resolution of [the Chargeback order]." ¹⁶ The Commission did so because certain pending cases would have significant implications on the CalPX's ability to release funds.

The Commission orders:

(A) Powerex's request for clarification is hereby granted, as discussed in the body of this order.

(B) Powerex's request for rehearing is denied, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting in part and concurring in part
with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁶See March 27 Order at 62,124.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Powerex Corporation

v.

Docket No. EL03-50-001

California Power Exchange Corporation

(Issued July 24, 2003)

BROWNELL, Commissioner, dissenting in part and concurring in part

1. As I concluded in my separate statement to the March 27 order, I believe the majority has improperly taken collateral pledged for one legal purpose—ensuring Powerex's settlement of accounts when billed by the CalPX—and converted it into a guaranty for a totally different purpose—payment of any future Commission-ordered refunds that Powerex may owe. Powerex Corporation v. California Power Exchange Corporation, 102 FERC ¶ 61,328 (2003). Therefore, I would grant rehearing.

2. With regard to the chargeback issue, I reiterate that I am willing to defer action until the Commission acts on the rehearing of PG&E Company, et al., 95 FERC ¶ 61,020 (2001), in which the Commission found application of the chargeback mechanism by the CalPX to sellers in its markets to cover defaults of SoCal Edison and PG&E to be unjust and unreasonable. However, I do so with the expectation that the Commission will take action on that rehearing promptly.

Nora Mead Brownell